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Keynote Address

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Keynote Address at the Annual Nova Law Review Banquet, March 20, 1999: Civility and Professionalism in Legal Advocacy

Honorable Gary M. Farmer*

I am greatly honored to have been asked to be the speaker at your Law Review banquet. Nova Law School is a great asset to our community. Its graduates—especially its law review graduates—can justly take their place with any in the country. Many of the judges of my court have found their law clerks from the ranks of Nova Law Review graduates, myself included. My first two clerks were from this law school and I rank them among the best I have had. And so, I congratulate all of you for your achievement. You are indeed a credit to your school.

I must say, your invitation brought to mind a similar occasion now more than a quarter of a century ago. I was privileged to be the managing editor of the University of Toledo Law Review. And, like you, we threw an annual banquet to celebrate the rites of spring and imminent graduation. The banquet was obviously held in Toledo rather than the more hospitable environs of Fort Lauderdale in the spring. Still, after three intense years of study and labor, it was a moment to reflect on what we had done and, more importantly to all of us, where we were going. As it happens our featured speaker that night was also a judge on the state intermediate court of appeal, the Sixth District of Ohio. After the ritual opening remarks and obligatory joke, he turned to a subject that later fell from favor for a long time in the legal profession but which has since been resurrected today and has become, as one of my colleagues calls it, "the new religion." The subject was of course "Civility and Professionalism" and I should like to take it up briefly tonight, for it made a lasting impression on me.

It is fitting that I raise this subject with you even though you have yet to sit for the Bar exam, much less take the oath of a lawyer. You have not yet been ensnared by the seductions of legal practice. Each of you is, in a professional ethical sense, a *tabula rasa*. Each of you is free from any compromises with the lawyers oath. What I hope to do now is plant little seeds in you of a determined civility before you have responded to the temptation to become like some media lawyers — to begin your careers with a mindset to do something about the low esteem into which our profession has slipped.

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I recently had occasion to participate in a seminar on civility and professionalism among lawyers sponsored by the St. Thomas More Society. For those who do not know the organization, it is a group of Catholic lawyers who are interested in perpetuating the principled ethics of the Chancellor of England under Henry VIII. As a child of the Catholic church, educated by the wonderful Ursuline nuns in Toledo, where I grew up in the parish of Rosary Cathedral, I identified with the group and its ideals and thought it altogether fitting that the Society should sponsor a seminar on the subject.

Roughly at the same time, I had a similar experience with another group, called the Inns of Court. If you haven't heard about the Inns, I urge you to look into it. Like the St. Thomas More Society, it is dedicated to advancing professionalism and ethics among lawyers. I participated in a pupilage group of the Inn of Court in Fort Lauderdale. In our presentation last November, we took scenes from Robert Bolt's magnificent play about More, "*A Man For All Seasons*," and contrasted them with skits representing events taken from the recent impeachment crisis. And so it can be said that when I accepted your kind invitation to speak tonight, civility and professionalism and Thomas More had all come together as one in my mind.

Today our profession is under attack everywhere. We are almost universally portrayed in the media as obnoxious and unprincipled. We are seen to plead our causes with vulgar hyperbole, to continuously orate at the top of our voice, and usually with abrasive personal attacks. We are shown to do anything to get clients and win cases. We are routinely portrayed as lying to courts, clients, and other lawyers, as having little interest in justice or the needs of society as a whole. We are shown as immersed in the attitude that our only goal, our only concern, is money.

One group of judges has written thus on the current incivility among lawyers:

> Today our talk is coarse and rude, our entertainment is vulgar and violent, our music is hard and loud, our institutions are weakened, our values are superficial, egoism has replaced altruism and cynicism pervades. Amid these surroundings none should be surprised that the courtroom is less tranquil. Cardozo reminds us that 'judges are never free from the feelings of the times.'

The print and electronic media weekly carry pieces on the decline of lawyers, and the low esteem in which they are held by the public as compared to other professions. There is a perception that the public thrills at stories in which a lawyer is ridiculed, defeated or disgraced. In fact, is it just me, or do many of you have the impression from the media that legal advocacy is synonymous with incivility?

Television today is filled with lawyers as talking heads. If they aren't talking about the President and the impeachment or civil cases, they are debating whatever current trial is the obsession of the media. It seems that every subject inevitably comes down to its legal ramifications. Even some sports pages now have a section devoted only to "jurisprudence," as one daily calls it.

A large number of these lawyers in the media argue their position with striking incivility. They interrupt their opposing member; they shout over contrary views; they use personal attacks on those with whom they disagree; they treat every misstatement as intentional lying, as purposeful fraud; and they use incessant overstatement and hyperbole to characterize their own positions. Is it any wonder that many nonlawyers have come to believe that legal advocacy is what they see constantly on television.

Sadly, much of this abusive advocacy is repeated in our courtrooms by lawyers who seem to draw an inference of permissibility from media pervasiveness. Much of the legal argument I see and read in appellate cases is filled with the counterparts of all of these media sins. Many lawyers habitually interrupt their opposition; they characterize the slightest misstatement as a lie; they fill their argument with all manner of personal attacks on their opposing lawyers and parties; and they seem unable to say much without overstatement. Yet none of this is necessary to be an effective advocate, and it is usually counterproductive in our court.

Yet some in the bar denigrate these attacks on lawyers. Many lawyers and bar leaders dismiss them as the censure of the angry and uninformed. I recently read a piece by the head of a local bar association ridiculing the frequent use of the well-known quote from Shakespeare, "The first thing we do, let's kill all the lawyers" as an attack on the legal profession. The point was made, and rightly so, that in context the passage is in praise of lawyers as fundamental protectors of the rights of people. Indeed we are. But it is not enough to indicate the infelicity of that particular quote as a basis to mount an attack on lawyers. We must instead ask ourselves what lawyers and the organized bar should do about the problem of our image.

An essential basis for my message today is that these attacks have a foundation in truth and that we should strive to eliminate that basis by reforming our own conduct. To my mind, a good place to begin is the elimination of the notion—which we see early in the law schools today and fostered by the media itself—that the only purpose of lawyering is winning: prevailing in litigation, prevailing in legal advocacy, prevailing in debate on subjects in which law is an element, prevailing in statements of opinion about current events, dominating any discussion or any proceeding in any forum—just, simply winning.

I think we should condemn the win-at-all-cost mentality in our profession. While our code of professional conduct demands that we

represent our clients zealously, the duty of zeal is not a blanket excuse from the many restraints on our conduct. No one would seriously contend for example, that the duty of zeal allows a lawyer to injure his adversary to render him unable to come to the courtroom. It is appropriate therefore to begin by asking ourselves just what the duty to represent a client zealously means.

Does it mean that our duty lies only in victory, solely in the ultimate vindication of the client's position? Is the role of the lawyer to ensure that every client becomes the prevailing party? Or is our duty as advocates less connected with the result and more with the process? I submit it is the latter. The representation of clients, in my opinion, is focused on the process itself rather than the outcome.

In our adversarial system of justice, there cannot possibly be two winners in every case. The system is designed, I submit, to concentrate on the forum and the procedural and the law to be applied there. It is thought in the best interests of society that disputes are better resolved in this neutral forum with established rules that allow each side to be fairly heard. The role of the lawyer is to use every legal device *under our ethical restraints* to present the client's side of the dispute as fully as the circumstances require. This institutional design is based on the assumption that if each party is heard within the framework of prior rules of conduct and procedure before neutral decision-makers, it is more likely that the ultimate outcome will be just. The design is therefore not tied to the outcome but instead to the process. If it is fair, if all sides present their case zealously but as restrained by the rules, the probability is that the result will be fair.

I recognize that this process often presents considerable limitations or constraints in a given case. The law may be well and truly settled, the facts all but indisputable. An unambiguous statute may block the result your client seeks. But—I submit—that circumstance is inevitable in a democratic society governed by a rule of law. Indeed to be a lawyer means precisely that one is governed by, and submits to, established rules of conduct, even when the rules go against one's goals. To be a lawyer is to submit to restraints on one's liberty to act in the belief that if all are similarly restrained each has the best chance of using one's talents within that framework of rules to achieve success. That is the great paradox, I suggest, in a system of the democratic rule of law: *each one of us is actually liberated by these common restraints.*

I am reminded of a wonderful observation by Professor Freund of Harvard Law School that encapsulates the attitude that I have in mind. He once addressed the complex and insoluble problems facing law and medicine regarding the use of experimental drugs or medical procedures on consenting patients. Near the end of his piece he addressed the essential dilemma facing both doctors and the law in recognizing that there were no easy

answers, that under the law doctors could not necessarily administer any procedure or substance to a patient, that ethical restraints sometimes act as a break on scientific progress. What he said was addressed specifically to doctors and judges, but it is equally applicable to all lawyers. He wrote:

> [M]edicine and law and art have an essential affinity. As the artist himself finds his freedom in the constraints of his medium, in the canons of taste and in respect for the limitations of his material, so the judge and the physician too find their freedom in their fetters, in the symbolic codes that assign them their roles and render it tolerable to make judgments involving life and death — fetters that somehow make it possible to surmount the agony and the absurdity of human decisions.

As a profession we simply cannot be so concerned with victory or the results achieved as we are today. Instead we must concentrate all of our talents, energy, and knowledge on the process itself: On making the best possible case for the client within the rules, but not in spite of them. We must find our professional freedom—and indeed our personal happiness—in remaining within the constraints of law as it affects our case. We should find the consolation of due and zealous performance of our mission in a healthy respect for our fetters, for the limitations imposed on us by the given facts, evidence, procedural rules, and substantive law. We will then find our professional freedom, not in winning or in being the prevailing party in every instance, but rather in the comfort that we have made the best possible case within those constraints.

We must be understood by the media and public—as a result of our own example of unflagging compliance with our ethical and legal codes—as dedicated to the rule of law. Again, by continued and unfailing compliance with these restraints, we must erase the current perception that our only interest is in winning. This must become true even when it is the hardest thing in the world to do. Even when our own most intimate and directly personal interests are at stake.

There is no better example of what I advocate than Thomas More. He was, as I said earlier, the Chancellor to King Henry VIII. He was in effect the highest lawyer in the realm. The King had long been married to Catherine, the daughter of the Spanish monarch and the sister of the Holy Roman Emporer, Charles V. Charles in turn, as an Elector, controlled the papacy. England had been a Catholic monarchy for nearly 500 years, since before 1066 and the Battle of Hastings. Queen Catherine had been unable to bear Henry a son, a male heir to succeed him on the throne. Because Henry feared a repeat of the civil war that broke out when his ancient predecessor, Henry I, died and was succeeded by his daughter Mathilda and her husband

Stephen, he sought an annulment of his marriage from the Pope. But pressure from Charles V and the Spanish throne prevented the Pope from acquiescing. Henry thus sought to use English law, which had no such authority or precedent, to obtain a divorce from Catherine. In this endeavor he needed the support of his Chancellor. Thomas More felt himself obligated by law to oppose his king. At a number of stages in the long affair, Henry gave Thomas opportunities to make subtle if unprecedented distinctions and thereby support him. More refused to compromise his understanding of the law and paid with his life on a charge of treason. At every stage in the proceeding Thomas More insisted on following the law as it was generally understood, even when equivocation would have saved his life.

The most important scene in Bolt's play eloquently portrays More's dedication to the rule of law. His wife and daughter urge him to use his office to have a man who represents some danger to him charged with a crime and arrested. His son-in-law, Roper, argues that God's law would condemn the man—to which More responds then let God arrest him. Roper calls that a sophistication, but More replies: "No, sheer simplicity. The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal."

More explains that the man should remain free until he has broken the law, even if he were the Devil himself. Whereupon his son-in-law protests that he would cut down every law in England to get after the Devil. It is then in reply that More articulates, in one of the play's magnificent passages, the great justification for the rule of law:

> And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat. This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

To my ear there is no more eloquent defense of our system.

One of the principal criticisms of lawyers today is that they will do whatever is expedient. I have often heard a lawyer justify incivility or unprofessional conduct with the expression that it was only right, that it would be very unfair for the client not to prevail. It is precisely that attitude that More rejects in this scene. The mere fact that you represent one of the sides in a dispute cannot possibly equip you to *know* where justice truly lies in a given case. What you do know, however, what you have been trained to know, is the *law*—not what is the *right* outcome for the parties. For the sake

of our profession, we simply must return in our daily work habits to that kind of scrupulous compliance with the law, the ethics, and the canons of our profession that this passage vividly demonstrates.

Recalling the popular perception of lawyers, especially media lawyers, we simply must resolve to free our advocacy from invective. It does no good to mount a personal attack on the other party or lawyer at trial. Judges will be turned off by it and begin casting around for legally sufficient reasons to rule against you. In spite of what you see on television, the art of persuasion does not consist of painting other people in the dispute in the worst possible light. On the contrary, the civil lawyer will instead present the case with a generous tolerance for the other side's motives, presentation and positions.

Do not become like one of the talking heads on Katie or Geraldo or Cokie. Do not ascribe the worst motives to your adversary. If the other side has misrepresented the record or a case, tell the judge that you *understand* the record to show whatever it is you contend that it shows, or the case to hold whatever you think it does. Do not cast every misstatement as a lie. In fact do not generally use that term to describe anything but what the evidence as resolved by the trier of fact has obviously done. If your version is diametrically opposed to that represented by your adversary, and upon review you turn out to be correct and your adversay wrong, you will not have done better for yourself and worse for your adversary than all the invective in the world would have done.

Ours is an age of hyperbole. Almost any artist, artisan or athlete is the "greatest." The common inconveniences of modern society are "outrageous" or "tragedies." Every misstatement is a "lie" or a "fraud." Someone, or something, is either the "greatest" or the "worst." Ordinary feats of athletic prowess are routinely described as "awesome." As a society, we are largely unaccustomed to restraint or understatement in expression; exaggeration saturates our spoken and written speech. This too pervades legal discourse. But if you couch everything in the superlative, how indeed do you articulate the truly exceptional when it really does occur? If you continually refer to the routine as "awesome" how indeed will you explain when the truly awesome comes along?

It is time for lawyers in argument to return to the fine art of euphemism, of the gallant understatement. Instead of saying that the opposing lawyer is lying about the facts or a case, say that he or she has perhaps *overlooked* whatever it is that you contend. Instead of presuming that your opponent is intentionally misstating something, affect to indulge every presumption of adversarial good faith and then proceed to demonstrate—in the gentlest terms—by fact, law, or logic how and where your adversary has gone awry. Instead of arguing that something is an insult say, as President Kennedy once did, that it bargains an apple for an orchard. The hardness of the blows that you strike for your cause should in all events abide in the force of their

reason and accuracy, not in the force or color of their invective. Because hyperbole and grand overstatement are pervasive in our society, a gentle understatement may do more to persuade than anything else.

Keep the most civil of tongues, and the civil hand in your written argument. Never, never engage in personal attacks on your opposing lawyer—not even when the opposing lawyer does it to you. Don't do it the first time; don't do it ever. While honest emotion can be effective even in appellate discourse, it should be rare and never directed at another lawyer in the case. And its use against a party should always be supported by clear evidence in the record and be logically related to a legitimate issue actually raised and presented for resolution in the appeal.

Moderate your tone and manner. We have all heard the adage that the surest way to be heard above the din is to whisper. Being wrong in argument is bad but being wrong at the top of your voice is unbearable. As I suggested earlier, from the lawyers on television it seems that all legal argument is at the top of one's voice. Be marked by the softness of a kind civility of your tone and manner. Develop a gentle tongue, and thereby improve your own image.

Never end a case with animosity to opposing counsel. Even when it hurts the most, when you have just suffered the most stinging defeat in your career, go over to the other table and congratulate the opposing lawyer on the good job. Shake her hand; smile, no matter the pain. Do not end that professional transaction with rancor. If, for no other reason, than you simply cannot predict when the other lawyer's good will may be helpful.

The English language is wide and deep and rich enough to make your case zealously without drawing upon the worst in human emotions, without dealing in anger and petulance and abuse. The professional tools are there for you to present every cause well within the law and your ethics. You can be more effective, even with a deference to your adversary. If you examine your own conscience and find that you have something approximating the characteristics of lawyers popularly perceived today, then I strongly urge you to begin the struggle to eliminate them and return to the example of Thomas More.

Come to law as a process, not with the sole purpose of winning every cause, but instead with a strong dedication to the rule of law. Make your client's case in the best way permitted by our law and ethics, but with the civility and personal restraint that marks the best of our profession. Return to the understanding that our professional role is most concerned with the process and with the belief that if we make the best case within the law and ethics, the probability is that the right result will be reached. Come back to law as a process.

Look upon your role as that of a teacher, who will lead the court through the legal thicket. And then, just as Virgil left Dante, leave all legal

proceedings with an air of grace, with an indelible perception of all that is good in legal advocacy. Leave your audience with a lasting impression of your dedication, not to the goal of victory above all else in the trial or hearing, but instead of an abiding deference to the rule of law, to the canons and ethics of professionalism, to the constraints and limits of circumstance and the primary codes of human conduct. Do that and there is a chance that we can erase the current low image of our profession and restore ourselves once again in the minds of fairminded people everywhere that ours is still the profession that gave the world a Thomas More, an Abraham Lincoln, a Louis Brandeis, and Thurgood Marshall.